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THE GEORGE A. LEET BUSINESS LAW SYMPOSIUM:

THE ROLE OF LAWYERS IN STRATEGIC ALLIANCES

INTRODUCTION

The rapid proliferation of strategic alliances – such as joint ventures, dealerships, franchises, and licenses – is transforming the way the world does business. Alliances have become indispensable in many industries due to globalization and to the acceleration of technological change. To flourish in these industries a firm must access foreign markets and develop new technologies quicker than it is capable of on its own; it must gain the resources of another firm through a business alliance. Those resources may be financial or in the form of expertise, as in technology or marketing.

The growth of alliances is also spurred by two new forces that pose a dilemma for firms. One is pressure to concentrate on a firm's core competencies and shed activities where competitors have greater expertise. We have learned that conglomeration is bad and focus is good. The other trend is to insist that firms not stand pat but constantly seek new sources of profit. To satisfy these seemingly incompatible demands, firms often try to maintain their focus while expanding their activities by partnering with firms that have complementary strengths. In the past, suppliers and customers dealt through ordinary contracts, but alliances better allow firms to speed innovation while maintaining flexibility to adapt to rapidly fluctuating market conditions.

Alliances are also transforming the work of business lawyers. In alliances the parties must trust and cooperate with each other much more than in the financings and acquisitions that are the traditional staples of corporate practice. As a consequence, in negotiating and drafting contracts for alliances lawyers must not only master a new set of substantive terms but assume a new demeanor, one that fosters such trust and cooperation.

Unfortunately, legal academia has almost completely ignored this trend. Finance and business authors have generated reams of books and articles poring over the theoretical and practical issues of alliances, but in law the literature comprises little more than the proceedings of a few continuing legal education programs. The probable reasons for this oversight are illuminating. Traditionally, firms acquire goods and services in one of two ways: they either "make" them within the firm or "buy" them in market purchase contracts. In legal academia, the former is covered in business associations; the latter, in contracts. Strategic alliances do not fit into either established category and seem to be falling between the cracks.

George A. Leet endowed the Business Law Symposium to tackle new issues and to cultivate imaginative analyses and solutions; therefore, this Symposium marks the first serious effort by legal academia to study strategic alliances. Since alliances differ from other business transactions fundamentally and not merely in technical details, any serious examination of alliances must incorporate several perspectives. One of these is a traditional legal analysis of the consequences of choosing a particular form of business organization (such as the joint venture) and of various contract terms. Another is a corporate finance analysis that investigates how alliances allocate property rights and address agency costs so as to maximize the parties' profit. Both these approaches rely on insights from psychology and sociology regarding how trust and cooperation are created and maintained so as to minimize risk to both parties.

To this spectrum of disciplinary perspectives must be added another set of perspectives, those of the various players in the game. First there are the parties, whose interests vary depending on their financial resources, the significance of the particular alliance within the firm, the inputs that they offer to the alliance, and the benefits that they hope to reap from it. Then there are the lawyers, who may be outside or in-house counsel. Finally, there are investment bankers, accountants, and others who advise the parties or facilitate the transaction.

The speakers for this Symposium bring a wealth of experience and represent a wide variety of these perspectives. Our first principal speaker, Stephen Fraidin, is a distinguished corporate lawyer who has also taught in law schools and written extensively about business transactions.¹ His article focuses on the control issues in

¹ See Stephen Fraidin & Radu Lelutiu, *Strategic Alliances and Corporate Control*, 53 CASE W. RES. L. REV. 865 (2003).

strategic alliances, especially where one partner in the alliance makes an equity investment in the other. In some cases this investment is complemented by a right of the investing company to acquire its partner. Alternatively, the investing company may make a takeover bid for its partner. What contract terms are desirable to cover these possibilities? And what are the fiduciary duties of the investing company to its partner?

The first commentator on Fraidin's article is another distinguished corporate lawyer and an alumna of our law school, Jeanne Rickert, who explores three issues in strategic alliances.² First, trust and cooperation in an alliance depend heavily on what will happen when the alliance terminates. The lawyers must help the parties in negotiating the alliance to focus on that issue which, in their desire to think positively and avoid conflict, they might prefer to ignore. Second, there is an inherent conflict of interest when an officer, who owes allegiance to the partner who is her employer, also participates in the governance of the alliance, where she owes duties to both partners. She notes that courts have not resolved this conflict, so it behooves the parties to work it out by contract. Third, non-competition clauses between partners can raise sticky problems when one partner is acquired by a company that competes with the other partner.

The second commentator on the morning panel is Dan Austin, a prominent investment banker in mergers, acquisitions, and alliances.³ He notes the potential problems when partners have different goals, like creating jobs on one side and maximizing profits on the other. Next he discusses how detailed alliance agreements should be arranged. Partners want to maintain flexibility to meet unexpected circumstances and to avoid haggling over contingencies that could undermine trust and cooperation, but a thoughtful, thorough set of rules can enhance trust and cooperation.

Following the comments was a lively colloquy among the panelists and the large audience, which included several experienced participants in business alliances. Among the issues discussed were the need for lengthier negotiations than in other deals because the parties have to reach mutually acceptable terms; the difficult role of lawyers and the need for business people to talk without lawyers present; the desirability of arbitration and other

² See Jeanne M. Rickert, *Keep Your Eyes Open: Avoiding Unintended Consequences in Joint Venture Relationships*, 53 CASE W. RES. L. REV. 897 (2003).

³ See Daniel F. Austin, *A Businesspersons' Perspective Concerning Joint Ventures*, 53 CASE W. RES. L. REV. 905 (2003).

dispute resolution clauses; and the possible benefits of outside advisors.

The main speaker on the first afternoon program was Rachelle Sampson, a finance and management scholar who also holds a law degree.⁴ She begins by noting that an alliance can entail either profit-sharing, perhaps through a separate entity (like a joint venture partnership or corporation), or a contract with stipulated consideration instead of profit-sharing. She then asks under what circumstances either of these is preferable to the other. One approach by scholars to this issue focuses on the allocation of property rights to induce the most efficient investments by the partners. Another approach – transaction cost economics – focuses on protecting a partner who has made an investment from holdup by the other party, who may refuse to cooperate after the investment has been made.

In theory, an equity (or profit-sharing) alliance (like a joint venture) is more suited for complex arrangements, where it is difficult to specify the rights and duties of the parties in advance, in order to monitor the partners' compliance and to enforce the contract by proving a breach if one occurs. Equity joint ventures are not always optimal, though. They are often too costly to set up and operate in simpler transactions where a traditional contract will suffice. Another determinant of alliance structure is whether there are prior dealings between the parties or a social network within an industry that reduce moral hazard problems so that costly formal structures are not needed.

Professor Sampson measures this theory against her empirical study of alliances. She gauged the complexity of a number of equity and non-equity alliances and then ascertained how many patents each alliance succeeded in obtaining. She finds that in complex alliances the equity joint venture outperforms the pure contract mode, but that in simpler alliances the opposite is true. In short, practice confirms theory; structure matters.

She also looked at alliance successes as a function of prior alliance experience. She found that the more alliances you do, the better you get at them; that recent experience is more valuable than older experience; and that experience is most important for success in equity joint ventures – i.e., alliances with highly uncertain activities. During the symposium colloquy, she also noted that firms with wide experience in alliances have begun to institutionalize their alliance design and management processes. She concludes

⁴ See Rachelle C. Sampson, *The Role of Lawyers in Strategic Alliances*, 53 CASE W. RES. L. REV. 909 (2003).

that since structure matters and lawyers can play a critical role in designing alliances structures, lawyers should not be excluded or slighted in negotiating alliances.

The first commentator on Professor Sampson's presentation was Professor Susan Helper, an economist at our Weatherhead School of Management who has, *inter alia*, closely studied supplier-customer relations in the automobile industry.⁵ She first notes that factors that were omitted from Professor Sampson's study, rather than choice of alliance structure, could account for differences in their success – i.e., we cannot necessarily conclude that alliances that obtained fewer patents chose the wrong structure. She also discusses how one or both partners may have other goals than to maximize the number of patents obtained. For example, one partner may be primarily interested to learn more about a product, industry, or market.

She discusses how a major purpose of an alliance may also be to get acquainted with a partner with whom one may eventually want a closer relationship. Accordingly, alliance partners typically start with a small project and progress to larger, more complex projects if their initial experiences are positive. In such cases, mutual trust accumulated over time may substitute for carefully drafted contract provisions and control structures.

Finally, Professor Helper suggests that lawyers may play a significant role in designing the proper incentives, like incentives to encourage people to share information. Toward this end it may be desirable to de-emphasize more traditional legal concerns, like intellectual property rights.

The second commentator on Professor Sampson was Sanjiv Kapur, a corporate lawyer with wide experience in international alliances.⁶ He noted that the terms of an alliance may be influenced by its purpose; e.g., whether it entails cross-border marketing as opposed to research and development. He also noted that legal issues, like firm liability, fiduciary duties, and the need for a domestic partner in a foreign market, influence choice of alliance structure.

He then listed some potentially significant business considerations not previously mentioned. For example, some firms want an alliance to be a separate entity in order to encourage the individuals participating in the alliance to identify with it and to be ex-

⁵ See Susan R. Helper, *Governing Alliances: Advancing Knowledge and Controlling Opportunism*, 53 CASE W. RES. L. REV. 929 (2003).

⁶ See Sanjiv K. Kapur, *Structuring and Negotiating International Joint Ventures: Anecdotal Evidence from a Large Law Firm Practice*, 53 CASE W. RES. L. REV. 937 (2003).

posed to a new culture. Accounting and tax considerations may also play a role. He agreed with Professor Sampson that complexity weighs in favor of an equity joint venture structure.

Finally, Mr. Kapur discussed his experience with several deals that either were never consummated or fell apart. In both contexts he noted the importance of changing needs and circumstances. He later noted that one kind of significant change is a change in the personnel in one partner, since trust rests partly on personal contact. Further, he discusses how the facts regarding each deal are unique, so that generalizations are hazardous. During the symposium colloquy, he discussed the importance of providing for termination since so many alliances do eventually unravel.

The last presentation was my own, which focused on the problems lawyers face because strategic alliances are so different from the other business transactions they usually handle.⁷ First, the goals of partners vary and may not be apparent to the lawyer. Second, although partners often shun protracted negotiations and long, detailed agreements, the lawyer may be blamed if the client comes to grief because of a gap in the contract. Accordingly, the lawyer must consult with the client about its goals, its expectations, and its willingness to assume various risks more than in other deals.

Alliances involve complex situations with great uncertainty that can never be completely eliminated by a detailed contract, so the parties must rely more on trust than on legal enforcement of contract terms. This, too, is unusual and problematic for lawyers. The role of advocate or hired gun that is instilled in lawyers can backfire by eroding the trust that is crucial to the success of an alliance. Instead, the lawyer has to strive for win-win solutions to problems that will please the other party, without neglecting the needs of the client.

The need of partners to trust and cooperate, often for many years, means that lawyers face greater difficulties in designing governance and termination mechanisms and protecting confidential information and property rights from opportunism. For the same reasons, disagreements are likely to occur, but litigation is impractical if the alliance is to continue. Therefore, the lawyer must devise dispute resolution mechanisms that maintain trust and cooperation. Because alliances are so diverse, lawyers cannot resort to their favorite drafting technique, which is simply to change

⁷ See George W. Dent, Jr., *The Role of Lawyers in Strategic Alliances*, 53 CASE W. RES. L. REV. 953 (2003).

the names from their last deal. Training lawyers to handle these problems will require major changes in legal education.

Although diversity is often trumpeted as a strength, it is often an obstacle to the creation of trust; people tend to trust those who are like themselves and to distrust those who are different. Sociologists and psychologists have discussed techniques for overcoming distrust born of diversity, and lawyers need to know these techniques. However, Professor Sampson noted in later colloquy that, despite the difficulties of fostering trust between diverse people, alliances of diverse parties often produce superior results.

The first commentator on my presentation was Hewitt Shaw, a respected tax lawyer.⁸ He argued that, despite the need for trust between allies, efficiency is served when each lawyer zealously represents his client. However, in so doing a lawyer must act with more finesse and understanding for the situation than in many other commercial arrangements. He stressed that often partners have very different firm cultures. For an alliance to succeed, the parties and their lawyers must recognize and cope with these differences. The lawyer's instinct to identify questions and nail down answers is extremely useful in this regard.

Mr. Shaw noted that after a contract is signed, the partners often disregard it; instead, they use the contract as a backup in case major disputes arise. Nonetheless, the process of reaching agreement is an important step in educating the partners as to what to expect from the alliance. He stressed that the shorter, less comprehensive contracts that business people often profess to favor can be both difficult to draft and dangerous in their incompleteness. He advised lawyers to alert their clients to gaps in the agreement.

Shaw reminded us that the trust needed for alliances is not blind faith. It rests largely on understanding how the partner's goals coincide with one's own and how they differ. Such a clear-eyed understanding is necessary to avoid unrealistic expectations about one's partner. Shaw also discussed the difficult questions of loyalty that can arise when a lawyer for one partner is asked to advise management of an alliance while also owing duties to the other party.

The last commentator in the Symposium was Wendy Shiba, a former professor of law, who contributed the unique perspective of

⁸ See Hewitt B. Shaw, Jr., *The Role of Outside Counsel in Forming Strategic Alliances*, 53 CASE W. RES. L. REV. 965 (2003).

the in-house counsel.⁹ She began by noting that the common comparison of alliances to marriage is problematic because, unlike spouses, partners often enter an alliance because of their differences and their contrasting strengths, and not because of their compatibility. She further noted that the design of the alliance depends in part on whether the partners expect to remain separate or whether they see the alliance as possibility leading to an acquisition.

Ms. Shiba reiterated Steve Fraidin's point that change-in-control clauses can wreak havoc and therefore should be reviewed carefully by lawyer and client. Related thereto, she stressed the importance of due diligence to determine, *inter alia*, whether the possible partner has change-in-control or non-competition agreements that might interfere with the proposed alliance. She also reiterated the importance of fiduciary duties; *e.g.*, clarifying the fiduciary obligations of employees of a partner who will be directors or agents of the alliance.

Shiba discussed the role of in-house counsel, particularly the importance of maintaining an independent voice, even if it means advising the business people to abandon a deal to which they are emotionally committed. She repeated the importance of getting the lawyer involved early in the deal and noted that in-house counsel may enjoy an advantage in that regard. As Jeanne Rickert noted in later colloquy, in-house counsel usually understands the firm's business better than outside counsel can. Ms. Shiba suggested that outside counsel should try to learn the client's business by arranging tours and briefings without charge to the client. She also mentioned alternative billing strategies that might benefit both client and lawyer. Finally, she suggested that business people are becoming disenchanted with complex joint venture arrangements and may be moving to simpler alliances, like licensing agreements.

This Leet Symposium is the first such event in legal academia to focus on strategic alliances; it certainly will not be the last. The economic importance of alliances is large and growing rapidly. Alliances are also increasingly important to lawyers and the law, but neither lawyers nor legal scholars have adequately addressed the distinctive problems that alliances create. I hope that this Symposium will ignite an interest in resolving this shortcoming.

GEORGE W. DENT, JR. †

⁹ See Wendy C. Shiba, *Representation of Joint Ventures: A Practical Perspective from In-House Counsel*, 53 CASE W. RES. L. REV. 971 (2003).

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STRATEGIC ALLIANCES AND CORPORATE CONTROL

Stephen Fraidin[†] and Radu Lelutiu[‡]

INTRODUCTION

News about the formation and dissolution of joint ventures seems to be a permanent feature of today's business world.¹ Yet, the recent proliferation of the joint venture form was hardly a surprise. Numerous authors writing at the beginning of the 1990s signaled that the joint venture would become a preferred vehicle for the pursuit of corporate opportunities, one that under the right circumstances is preferable to outright acquisition and a favored means through which companies would seek to enhance their ability to compete in the global markets.² These predictions were undoubtedly correct, as the last decade has witnessed both an unprecedented increase in the number of joint ventures formed around the globe,³ and an unexpected complexity in the nature of the agreements that govern alliances.⁴

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¹ The Article uses "joint venture" and "strategic alliance" interchangeably.

² See, e.g., J. Michael Schell & Marc J. Segalman, *New Deal Structures in the 1990's: Mergers of Equals and Strategic Alliances*, in CONTESTS FOR CORPORATE CONTROL 1991 575 (PLI Corp. Practice Course, Handbook Series No. 731, 1991) (discussing the factors that made strategic alliances a method of investment preferable to the straight acquisition and noting that the then-recent decision of the Supreme Court of Delaware in *Paramount Communications, Inc. v. Time, Inc.*, 571 A.2d 1140 (Del. 1990), recognizing long-term corporate goals as a concern that a company's board of directors may legitimately entertain, made the 1990s an opportune time for engaging in strategic alliances); see also Stephen M. Besen, *An Overview of Strategic Alliances*, 8 NO. 7 INSIGHTS 22 (1994) ("'Strategic alliance' is a buzzword of the 1990s. One can scarcely open a newspaper without reading about the latest alliance and the tremendous potential opportunities for its participants. From large scale alliances such as British Telecom/MCI, Time Warner/US West and British Air/US Air to start-ups like 3DO or General Magic, large and small companies are seeking strategic partners to enter new markets, develop new products and technologies, promote new standards or otherwise cooperate to gain advantages in the marketplace.").

³ See, e.g., Jeff Coburn, *All for One: Strategic Alliances Between Firms Are Good for Clients, Business*, 17 NO. 5 LEGAL MGMT., Sept.-Oct. 1998, at 46-47 ("[I]f the 1980s was the 'Decade of the Merger/Acquisition' then the 1990s is becoming the 'Decade of the Strategic Alliance.'").

⁴ See Stephen Fraidin & Douglas Pepe, *Emerging Challenges of Joint Venture Transactions*, in CORPORATE GOVERNANCE: CURRENT AND EMERGING ISSUES 1998 349, 358 (ALI-ABA Course of Study, Nov. 12-13, 1998).

As a result, especially over the past decade, joint ventures have received a lot of attention from practitioners, as well as from legal and economic scholars. A survey of prior literature, however, reveals that the overwhelming body of existing articles in the area attempt to answer concrete pragmatic questions, and most often, "how to implement a successful joint venture." While keeping these important practical aspects in mind, this Article approaches the joint venture concept from a slightly different perspective and addresses a related yet distinct set of concerns – namely, the interplay between the joint venture agreement and the impact of the alliance on the joint venturers, both in terms of governance and control. The authors believe that the success of a strategic alliance can be maximized if the impact of its underlying arrangement on aspects of governance and control of the venturers is understood.⁵ To that end, this Article raises a number of questions.

The Article begins by exploring the complex fiduciary duty issues that arise in the context of joint venture agreements. Drawing on existing scholarship, the Article argues that vexing dilemmas are likely to mark the destiny of such joint enterprises. The common nature of joint venture agreements, together with likely changes in the ownership and business strategies of the parent companies, make such issues unavoidable. To alleviate those dilemmas and to prevent opportunism, the Article argues that when contemplating a joint venture arrangement, certain companies should try to encourage their potential business ally to issue equity for their benefit in connection with the joint venture.⁶ Further, the Article warns that, despite their beneficial impact, these decisions raise a number of difficulties and are potentially subject to judicial scrutiny under the more exacting standard set forth by the Dela-

⁵ By "success," this Article means not only financial gain for the joint venturers, but also the lack of discord and the maximization of cooperation between the members of the alliance. As scholars oftentimes note, the term "success" in the context of strategic alliances has a more opaque meaning than in usual circumstances. See George Dent, *Lawyers and Trust in Business Alliances*, 58 BUS. LAW. 45, 60 (2002) ("[G]oals are often vaguer in alliances than in other deals; the aim may be no more specific than the optimal exploitation of each other's research capabilities.").

⁶ This is indeed oftentimes done in practice. This Article does not address the antitrust concerns that might surround cross-equity joint ventures. According to the authors' research, no articles have addressed this discrete issue. For general treatment of the antitrust issues raised by joint venture agreements, see Ronan P. Harty, *Joint Ventures and Antitrust*, in INTERNATIONAL JOINT VENTURES 2002 99 (PLI Comm. Practice Course, Handbook Series No. 835, 2002); Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1521 (1982); Richard J. Hoskins, *Antitrust Analysis of Joint Ventures and Competitor Collaborations: A Primer for the Corporate Lawyer*, 10 U. MIAMI. BUS. L. REV. 119 (2002); Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 ANTITRUST L. J. 701 (1998).

ware Supreme Court in *Unocal Corp. v. Mesa Petroleum Co.*,⁷ and other cases that follow *Unocal*. The Article suggests that, in order for those decisions to be immune from judicial second-guessing, the parents should carefully examine the implications of these equity investments, while aiming to comply with a heightened standard of care.

The Article is divided into five parts. Part I commences by discussing joint ventures in general and then proceeds to explore the business purposes served by these entities. Part II discusses two themes of interest from the existing legal scholarship which have a bearing on the issue of corporate control. Specifically, Part II traces two debates: (1) whether joint venture agreements should be negotiated so as to include as many details as possible (the "thorough contracting" approach), or so as to only outline the basic terms of the parties' agreement (the "flexibility" approach); and (2) the status of fiduciary duties in the context of joint venture agreements. Part III attempts to illustrate the practical dilemmas that confront the parents of a joint venture. It does so by reproducing and analyzing the history of Time Warner Entertainment, a celebrated joint venture whose lengthy destiny not only illustrates the venturers' expectations vis-à-vis the alliance, but also how unexpected developments can lead them to impasses once their respective paths diverge. Building on the previous sections, Part IV explores the desirability of equity investment arrangements undertaken in connection with joint venture agreements. This section sets forth several factors whose presence might make equity investments in the potential business partner desirable for one or both parent companies. Finally, Part V discusses specific issues of corporate governance and control that arise in the context of joint ventures with an equity component, and suggests solutions for effectively dealing with such challenges.

I. BUSINESS PURPOSES SERVED BY THE JOINT VENTURE AGREEMENT

The joint venture, also known as a strategic alliance, is a means by which parties pool their resources and combine their efforts for profit.⁸ An overview of the various types of ventures or-

⁷ 493 A.2d 946 (Del. 1985) (noting that a fiduciary duty exists to protect the corporate enterprise, which includes protecting stockholders from reasonably perceived harm, and requiring reasonable and good faith grounds for corporate actions).

⁸ See 46 AM. JUR 2D *Joint Ventures* § 1 (1994) ("A joint venture is frequently defined as an association of two or more persons formed to carry out a single business enterprise for profit. More specifically, it is an association of persons with intent . . . to engage in and carry out a single business venture for joint profit, for which purpose such persons combine their property,

ganized in the 1990s reveals that they can be categorized in seven categories: technology distribution ventures; cross-licensing arrangements and joint product development ventures; industry coordination ventures; research consortia; start-up ventures; access to foreign markets arrangements; and, 'no paradigm' ventures.⁹

The explanations conventionally offered for the parties' willingness to form joint ventures are straightforward: parties unite their individual resources with an expectation that the resulting whole will be greater than the sum of its constituent parts.¹⁰ As such, cooperative alliances adequately answer efficiency concerns and provide complex competitive and synergistic advantages over traditional investment arrangements.¹¹ Modern strategic alliances respond to concerns that fall in five categories: geographical access concerns; risk minimization; access to strategic resources and globalization concerns; marketing, joint product development, and network benefits; and the synergy test.

A. Geographical Access Concerns

The fall of the Iron Curtain and the recent shifting political paradigms across the globe were followed by the emergence of previously untapped markets which displayed great investment

money, effects, skill, and knowledge . . ."); see also Ron Ben-Yehuda, *Joint Ventures, in STRUCTURING, NEGOTIATING & IMPLEMENTING STRATEGIC ALLIANCES* 201 247 (PLI Corp. Practice Course, Handbook Series No. 1260, 2001) (A joint venture typically involves "an association of economically independent business entities (the 'Venturers') for a common commercial purpose of defined scope and duration, by contract or in the form of a new business entity, and by means of which the Venturers pool resources and share risks, rewards and control . . ."); cf. Brodley, *supra* note 6, at 1526 ("[A] joint venture may be defined for antitrust purposes as an integration of operations between two or more separate firms, in which the following conditions are present: (1) the enterprise is under the joint control of the parent firms, which are not under related control; (2) each parent makes a substantial contribution to the joint enterprise; (3) the enterprise exists as a business entity separate from its parents; and (4) the joint venture creates significant new enterprise capability in terms of new productive capacity, new technology, a new product, or entry into a new market.").

⁹ Fraidin & Pepe, *supra* note 4, at 352-55.

¹⁰ V. Scott Killingsworth, *Form, Function and Fairness: Structuring the Technology Joint Venture*, 15 No. 3 COMPUTER LAW, Mar. 1998, at 1, 3.

¹¹ See Richard D. Harroch, *Strategic Alliances, in STRUCTURING, NEGOTIATING & IMPLEMENTING STRATEGIC ALLIANCES* 1997 121 (PLI Corp. Practice Course, Handbook Series No. 1002, 1997) (listing benefits of strategic alliances and providing comparisons among strategic alliances and other alternatives); KATHRYN RUDIE HARRIGAN, *MANAGING FOR JOINT VENTURE SUCCESS* 17 (1986) (listing among one of the competitive advantages that joint ventures allow firms to gain larger access to capital); see also Ben-Yehuda, *supra* note 8 (noting that joint ventures allow for the pooling of resources and the sharing of risks); Brodley, *supra* note 6, at 1525 ("By integrating certain operations of the participating firms, a joint venture creates additional productive capacity through the formation of a new producing organization, the development of a new product or technology, or the entry into a new market.").

potential.¹² However, most, if not all, of these markets were regulated by arcane and parochial laws and were controlled by biased law-enforcing institutions.¹³ The risk of dispute resolution before one of these tribunals and the impossibility of compliance with complicated regulatory schemes made traditional-type corporate entities a risky option for investors interested in pursuing opportunities in the newly-discovered markets.¹⁴

Oftentimes developed to deal with local, cultural, or social barriers to investment in a particular locale, the joint venture agreement attempts to circumvent these geography-related concerns.¹⁵ For instance, a Western investor that wishes to pursue a business opportunity abroad may be deterred by requirements such as local incorporation, certain mandatory quotas of local ownership, or compliance with unfavorable local laws. However, because the joint venture form is a creature of contract,¹⁶ the availability of strategic alliance arrangements allows foreign investors to circumvent the necessity of local incorporation and that of compliance with complicated local regulatory mechanisms.¹⁷ This alternative also allows parties to minimize their amenability to suit in the local courts that they perceive as inadequate, since the preferable option of arbitration before government-neutral or other impartial tribunals is available through contract negotiations.¹⁸

¹² Blaine V. Fogg & Stephen F. Arcano, *Strategic Partnerships and Alliances, in ACQUISITIONS, MERGERS, SPIN-OFFS AND OTHER RESTRUCTURINGS* 1993 407, 411 (PLI Corp. Practice Course, Handbook Series No. 825, 1993) (noting the increasing globalization of business in the early 1990s due to political changes such as the fall of the Iron Curtain).

¹³ See, e.g., GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 7 (2d ed. 2001) (describing the benefits of arbitration in such markets).

¹⁴ See Erika P. Schultz, *Joint Venture Agreements: A New Mechanism for Investing in Colombia*, 12 *WORLD ARB. & MEDIATION REP.* 190 (2001) (explaining that the joint venture provides a way of avoiding a regulated formal process and a mechanism for deciding any disputes).

¹⁵ See generally Steven R. Salbu, *Parental Coordination and Conflict in International Joint Ventures: The Use of Contract to Address Legal, Linguistic, and Cultural Concerns*, 43 *CASE W. RES. L. REV.* 1221 (1993) (analyzing the role of joint ventures in transactional business activity).

¹⁶ See 46 *AM. JUR. 2D Joint Ventures* § 18 (1994) ("The rights, duties, and obligations of joint venturers, as between themselves, depend primarily upon the terms of the contract by which they assumed that relationship.")

¹⁷ See Schultz, *supra* note 14, at 191 (noting that because joint venture have a specific purpose stipulated by agreement, they do not require the incorporation of a new legal entity, and allow parties to escape local regulatory procedures and to structure their relationships as they please).

¹⁸ See Hans Smit, *The Future of International Commercial Arbitration: A Single Transnational Institution?*, 25 *COLUM. J. TRANSNAT'L L.* 8, 9 (1986) ("Rather than permit international disputes to be settled in national courts, many parties often prefer to submit them to a tribunal that is not part of the governmental structure of a particular state . . . Nationalistic favoritism can... be avoided by selecting a forum in a neutral state . . ."). Notably, most developing nations, and all of the former communist states, are signatories to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the New

B. Risk Minimization

The economic instability which typically characterizes emerging markets made entrepreneurs interested in pursuing the new possibilities cautious. Would-be investors believed that substantial traditional-type cash investments were threatened by uncharted risks.¹⁹ Additionally, as already stated, the legal uncertainty surrounding the new markets heightened the level of insecurity and consequently the potential investors' sense of discomfort.²⁰

The concept of joint venture provides a simple answer to these problems. Its essential characteristics – profit sharing and risk minimization – make the joint venture form a particularly suitable method for reaching toward potentially profitable but uncertain markets.²¹

C. Access to Strategic Resources and Globalization Concerns

From an economic perspective, the increase in the number and types of joint venture agreements was an answer to the perceived need for serving global clients.²² Simply put, in industries where capital investment was prohibitively high and required a substantial time commitment, the cooperation fostered by the joint venture form provides a most desirable alternative.²³ Resorting to joint venture agreements not only allows local companies to export their

York Convention), codified at 9 U.S.C. § 201 (1999). The New York Convention was a significant step toward enforcement of arbitration provisions contained in contracts that fall within its scope, and similarly, toward the enforcement of arbitral awards.

¹⁹ See Steven R. Salbu & Richard Brahm, *Planning Versus Contracting for International Joint Venture Success: The Case for Replacing Contract With Strategy*, 31 COLUM. J. TRANSNAT'L L. 283 (1993) [hereinafter *Planning Versus Contracting*] (pointing out that most strategic alliances target volatile and unpredictable environments, extend into cultures unfamiliar or uncomfortable with Western corporate notions, and are chosen by parties for their peculiar ability to meet the demands of succeeding under such conditions or, in other words, for their ability of "riding the wave.").

²⁰ See *id.*

²¹ See Fogg & Arcano, *supra* note 12, at 414-16 (noting that, while risks still exist in the context of joint venture agreements, the parties have the option of addressing them *ex ante*, a fact which makes the joint venture a less risky investment method than an acquisition); see also discussion *infra*.

²² See Coburn, *supra* note 3, at 46; see also William J. Kolasky, Jr., *Structuring, Negotiating & Implementing Strategic Alliances: Antitrust Enforcement Guidelines for Strategic Alliances*, 1063 PLI/CORP 499, 502 (1998) (noting that strategic alliance arrangements are becoming increasingly more important to global competitiveness).

²³ See Rafiq Al-Shahbaz, Note, *Joint Ventures, ASEAN and the Global High Technology Industry*, 18 T. MARSHALL L. REV. 327 (1993) (arguing for a rethinking of the treatment of joint ventures to encourage entrepreneurship and cooperation in industries where capital investment is prohibitively high and requires years of development to produce competitive consumer products).

products to distant markets with minimal costs,²⁴ but it also eases the movement "from vertical to 'virtual' integration."²⁵ As a result, companies focused on adding value in the areas where they excel are able to "off-load and manage the rest of the value chain through cooperative relationships and alliances."²⁶ Entering into strategic alliances allows parties to become more competitive and efficient through the sharing of facilities and data in unconcentrated or moderately concentrated markets.²⁷ This process results in substantial savings which, in turn, are passed on to the consumers.²⁸

D. Marketing, Joint Product Development, and Network Benefits

On a closely related point, from a technology point of view, the 1990s witnessed the climax of high technology and industries characterized by short product cycles, technical interdependence of products, fluid standards, and globalization of markets.²⁹ Given the prevailing market conditions, former competitors soon realized the difficulties inherent in exploiting the full potential of new inventions before they became obsolete.³⁰ Additionally, the complex fusion of computer, communications, and consumer electronics industries made it plain that the former competitors needed to collaborate in order to survive and remain competitive.³¹

Because a strategic alliance can take the shape of cross-licensing agreements, joint marketing or distribution and sale agreements, joint product development arrangements, or various consortia, it provides an effective response to the short-lived product cycles and ensuing necessity to quickly exploit a product's full potential before it becomes obsolete.³²

²⁴ See Scott C. Withrow, *Strategic Alliance for Small Businesses (with Form)*, PRAC. LAW, July 2000, at 11, 13 (arguing that strategic alliances preserve the advantages of the small business and leverage these with the marketing resources of a large enterprise).

²⁵ Charles T.C. Compton, *Cooperation, Collaboration, and Coalition: A Perspective on the Types and Purposes of Technology Joint Ventures*, 61 ANTITRUST L.J. 861, 869 (1993).

²⁶ *Id.* (quoting Prof. James Brian Quinn of Dartmouth College).

²⁷ See Svetlana Mosin, *Riding the Merger Wave: Strategic Alliances in the Airline Industry*, 27 TRANSP. L. J. 271, 272 (2000) (discussing the reasons why competitor airline industry players opt to enter into strategic alliances).

²⁸ *Id.*

²⁹ See V. Scott Killingworth, *Strategic Licensing: Leveraging Technology Through Alliances*, CYBERSPACE LAW, Sept. 1998, at 13 (discussing the key legal and conceptual tools available in the licensing context).

³⁰ *Id.*

³¹ See Compton, *supra* note 25, at 871-77.

³² *Id.* at 869; see also Brodley, *supra* note 6, at 1528-29 ("[J]oint ventures can effect economies of scale in research not achievable through single-firm action. Because of these advantages, joint ventures are especially likely to provide an optimal enterprise form in undertakings involving high risks, technological innovations, or high information costs.").

E. Synergy Test

Finally, as commentators point out, a joint venture often paves the way to a merger between its parent companies.³³ As such, the joint venture arrangement may serve to test the compatibility of the parent companies before a full-blown merger is pursued.

II. TWO THEMES OF INTEREST

As previously mentioned, there have been a substantial number of articles written about strategic alliances. Virtually the entire body of existing literature on the topic addresses the practical side of implementing a successful strategic alliance. There are, however, two aspects discussed in the prior literature that merit discussion for purposes of this Article: (1) flexibility versus thorough contracting in the context of joint venture agreements; and (2) special fiduciary duties that arise in the context of joint ventures.

A. Flexibility or Thorough Contracting

As mentioned previously, joint ventures have been understood as creatures of contract. As such, numerous authors writing on the topic, most notably Stephen Glover, Zenichi Shishido, and Steven Salbu and Richard Brahm, point to the fact that by resorting to the joint venture form, the venturing parties are able to consider potential problems in advance and to resolve them *ex ante* via contract negotiations.³⁴ The partisans of *ex ante* problem-solving strategies argue that risk minimization, one of the beneficial consequences the joint venture form promises, requires that potential uncertainties be muted in advance as much as practically possible. The argument certainly makes sense – because there are no joint venture statutes to ease the parties' dilemmas and little common law on point,³⁵ the joint venturers should attempt to deal with the unknown and thus spell out their intentions in advance.³⁶

³³ See Harroch, *supra* note 11, at 124.

³⁴ See, e.g., Stephen I. Glover, *Joint Ventures and Opportunity Doctrine Problems*, IN-SIGHTS, Nov. 1995, at 9-10; see also David E. Brown, Jr., Kathryn M. Cole & Joseph A. Smith, Jr., *Strategic Alliances: Why, How, and What to Watch For*, 3 N.C. BANKING INST. 57, 61 (1999); Salbu & Brahm, *supra* note 19, at 286; Zenichi Shishido, *Conflicts of Interest and Fiduciary Duties in the Operation of a Joint Venture*, 39 HASTINGS L. J. 63, 90 (1987).

³⁵ See Adam B. Weissburg, Note, *Reviewing the Law on Joint Ventures with an Eye Toward the Future*, 63 S. CAL. L. REV. 487 (1990) (noting the absence of such statutes, criticizing the common law treatment of joint ventures, and arguing that legislatures should consider enacting a statute that contains provisions ensuring that the legal stance towards the joint venture protects the venturers' intent.).

³⁶ See Brodley, *supra* note 6, at 1527 ("[I]f [the drafters of the joint venture agreement] leave some of the terms open, there will be problems of opportunism (the tendency of economic

On the other hand, it is also well-established that one of the most important advantages of the joint venture form lies in its flexibility and its ability to adapt to unforeseen, ever-changing, market conditions.³⁷ Moreover, even the partisans of the previous approach, such as Stephen Glover, recognize that the joint venture form is an atypical investment mechanism, which defies the expectations commonly associated with other investment methods.³⁸ Writers who examine the issue warn that excessive focus on ownership and control may diminish the effectiveness of the venture.³⁹ Contrary to popular belief, less structured and more flexible approaches to designing a joint venture and “fifty-fifty”-type arrangements with regards to control and ownership are statistically more likely to lead to a successful venture and are consequently often preferred to other approaches.⁴⁰

The advocates of this latter approach, most notably George W. Dent, Jr., are also skeptical that the law of contracts can even provide an effective answer to problems that may arise in connection with strategic alliance agreements.⁴¹ Even leaving aside the impossibility of foreseeing the future,⁴² the need for flexibility, which is essential to the success of the joint enterprise, undermines attempts to “pre-resolve” matters by means of contractual arrangements. Discrediting the view that *ex ante* contract negotiations can provide the satisfactory answer, the advocates of the latter position instead suggest that we should look to “gap fillers” and “fiduciary duties” notions for a more viable solution.⁴³

agents to behave with stealth and guile) and information imbalance (the discrepancy in knowledge between parties that intensifies the effects of opportunism.”).

³⁷ See, e.g., George W. Dent, Jr., *Gap Fillers and Fiduciary Duties in Strategic Alliances*, 57 BUS. LAW 55, 90-91 (2001) (arguing that because strategic alliances depend heavily on trust and cooperation, the contractual duties and obligations of the strategic partners can only be vaguely traced in advance); see also Coburn, *supra* note 3, at 48.

³⁸ See Stephen I. Glover, *Negotiating and Structuring Joint Ventures: Lessons from Management Consultants*, M & A LAW, Feb. 1998, at 18 (arguing that lawyers’ risk aversion may undermine joint ventures and diminish their prospects for success).

³⁹ See William I. Schwartz, *Legal Issues Raised by Strategic Alliances Involving Multimedia*, COMPUTER LAW, Nov. 1993, at 19-20.

⁴⁰ *Id.* (summarizing relevant statistical data contained in studies undertaken by McKinsey & Company and Booz-Allen & Hamilton).

⁴¹ See Dent, *supra* note 37, at 77-80 (noting that contracts will be incomplete due to the prohibitive expense of drafting for a large number of contingencies).

⁴² See Brodley, *supra* note 6, at 1527 (“[I]f [the drafters of a joint venture agreement] attempt to specify their mutual obligations exhaustively, they will encounter a bounded rationality problem – that is, an inability to foresee or to anticipate all future contingencies.”).

⁴³ The difference between the two is explained by Dent as follows: “Gap fillers and fiduciary duties are similar in many ways and the line between them is not bright. Both embody duties not drafted by the parties but imposed by law. Fiduciary duties may be seen as a subset of the broader category of gap fillers. Fiduciary duties differ, though, from gap fillers that are merely technical” Dent, *supra* note 37, at 71.

It is clear that the most plausible answer to the question whether it makes sense to minimize risks at the cost of restraining the potential success of the venture lies in a balancing test. The process of maximizing the likelihood that a venture succeeds as a profitable enterprise (the businessperson's goal) while minimizing various risks to the parent⁴⁴ (the lawyer's goal) is most likely to occur when the lawyers and business people fully understand each others' potential contribution and orchestrate the negotiating process of the venture so their joint skills are applied at the right time.⁴⁵

B. *Fiduciary Duties in the Context of Joint Venture Relationships*

Although joint ventures provide a viable solution to investors who seek to maximize profits while minimizing risks, resorting to the joint venture form leads to complications in the area of fiduciary duties.

The rights, duties, and obligations of joint venturers depend to a great extent upon the terms of the contract by which they assumed relationships within the joint venture.⁴⁶ Additionally, the default rule provides that,

the relationship between joint venturers, like that existing between partners, is fiduciary in character and imposes upon all the participants the obligation of loyalty to the joint concern in all matters affecting the conduct of the venturer's business.⁴⁷

Thus, the founding members of a joint venture owe each other and the common alliance fiduciary duties, which in turn divide into duties of care and duties of loyalty.⁴⁸

The traditional analysis of fiduciary duties is more complex in the context of joint ventures. After a collaborative enterprise is

⁴⁴ For a discussion of risks that arise in the context of joint ventures see William P. O'Neil, *Advanced Issues in Strategic Alliances*, in *STRUCTURING, NEGOTIATING & IMPLEMENTING STRATEGIC ALLIANCES* 2000 351 (PLI Corporate Law & Practice Course, Handbook Series No. B-1193, 2000).

⁴⁵ David Ernst & Stephen I. Glover, *Strategic Alliances: Combining Legal and Business Best Practices to Create Successful Strategic Alliances*, *INSIGHTS*, Oct. 1997, at 6, 6.

⁴⁶ 46 AM. JUR 2D *Joint Ventures* § 18 (1994).

⁴⁷ 46 AM. JUR 2D *Joint Ventures* § 33 (1994).

⁴⁸ See Brown, Cole & Smith, Jr., *supra* note 34, at 92-93. The "duty of care" is defined in Section 4.01(a) of the American Law Institute's *Principles of Corporate Governance* as "a duty to the corporation to perform the director's or officer's functions in good faith, in a manner that he or she reasonably believes to be in the best interest of the corporation, and with the care that an ordinarily prudent person would reasonably be expected to exercise in a like position and under similar circumstances." The "duty of loyalty" is the nebulous imperative that, as fiduciaries of the corporation, directors or officers may not usurp opportunities which belong to the corporation.

formed, a tripartite structure of fiduciary duties is instituted.⁴⁹ The interlocking directors and officers owe fiduciary duties to their sponsor, to the alliance, and, arguably, to their sponsor's new business partner.⁵⁰ The most complex issues concern the duty of loyalty owed by the members to each other and to the joint venture, respectively.⁵¹ The difficulty is exacerbated because investors in many alliances are actual or potential competitors of the enterprise in which they invest and because such investors often participate in different alliances that may be competitive with each other.⁵² To complicate issues further, and as Part III of this Article demonstrates, changes in the ownership or changes in the business strategies of the parent companies are likely to occur while the joint venture agreement is in existence.⁵³ Those changes not only impact the future of the venture, but also further complicate the task of the venture's directors who are torn between following the interest of their sponsor and those of the alliance.

Joint venture arrangements thus lead to a paradigmatic embodiment of the representative director's dilemma⁵⁴ and illustrate

⁴⁹ See Brodley, *supra* note 6, at 1527 (observing that the joint venture "differs from a merger, because it typically involves the creation of a separate, limited-purpose firm, not a union of two previously existing firms. Thus, the joint venture constitutes a functionally distinct organizational form, and its advantages and other characteristics can be understood only by keeping that distinction clearly in mind."); see also *id.* at 1529 ("There are, however, disadvantages in forming a joint venture. Compared with a single firm, the joint venture is a cumbersome organization. Control is divided, creating a problem of 'two masters.'").

⁵⁰ See Shishido, *supra* note 34. Whether the parent companies are each other's fiduciaries would seem to depend on the terms of the joint venture agreement. If, by virtue of the agreement, there is a significant shift in ownership rights, such as when for instance confidential information is disclosed as a result thereof, a fiduciary relationship may be created. See also D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1476-77 (2002) ("As with confidential relationships, determining whether alliances are fiduciary relationships is extremely fact-intensive, but the key facts still relate to allocation of ownership rights The critical resource in this instance is confidential information, and the success or failure of Tellabs' fiduciary duty claims should turn on whether it can convince a court that the information in question is really 'confidential.' Without confidential information, Tellabs would seem to have no viable fiduciary duty claim, as Riverstone appears to have used its own assets to manufacture the products.").

⁵¹ See Smith, *supra* note 50, at 1476-77 (noting the fact-intensive process of determining fiduciary relationships); see also Terence Woolf, Note, *The Venture Capitalist's Corporate Opportunity Problem*, 2001 COLUM. BUS. L. REV. 473 (2001) (discussing the duty of loyalty and the various tests developed by the court to explain what obligations must be fulfilled).

⁵² See Schwartz, *supra* note 39, at 23 (observing that strategic alliances relating to multimedia often involve partners that are competitors); see also Woolf, *supra* note 51, at 474 (observing that venture capitalists may owe loyalties to competing businesses).

⁵³ See Brodley, *supra* note 6, at 1529 ("[E]ven when a negotiated balance is achieved, it can be upset by changes in corporate goals, personnel, or parent control.").

⁵⁴ Cyril Moscow, *Corporate Governance: The Representative Director Problem*, INSIGHTS, June 2002, at 12, 12 (outlining the representative director's dilemma of dividing loyalties between the shareholders and sponsor).

the vexing "difficulties of double-parenting."⁵⁵ The case law and statutory authority on point fail to ease these tensions.

In *Weinberger v. UOP, Inc.*,⁵⁶ the Supreme Court of Delaware addressed the problem of the interested director. In reviewing a cash-out merger between a parent company and its subsidiary, the court wrote that "there is no dilution of this obligation [utmost good faith and inherent fairness] where one holds dual or multiple directorships, as in a parent-subsidiary context."⁵⁷ Along the same lines, statutory provisions impose equal fiduciary duties of good management owed by interlocking directors or officers to both special purpose vehicles and their sponsors.⁵⁸

As Cyril Moscow has pointed out, the dilemma of the representative director is not often considered.⁵⁹ Authors who have addressed the issue in the context of the duty of loyalty, while emphasizing the need for proper disclosure of directors' conflicts of interest,⁶⁰ urge that the tests usually employed by courts to determine whether an usurpation of corporate opportunity has occurred (the line of business test,⁶¹ the fairness test,⁶² the expectancy test,⁶³

⁵⁵ Steven R. Salbu & Richard A. Brahm, *Strategic Considerations in Designing Joint Venture Contracts*, 1992 COLUM. BUS. L. REV. 253, 291 (1992).

⁵⁶ 457 A.2d 701 (Del. 1983).

⁵⁷ *Id.* at 710.

⁵⁸ See James G. Leyden, Jr., *A Key State's Approach to LLC's: Delaware Can Be Different*, BUS. L. TODAY, May-June 2000, at 51, 59 (discussing at length the Delaware Limited Liability Company Act, 6 Del. C. §§ 18-101, et seq., and noting that, under prevailing law, if a manager or a representative of a member also serves on the board of another entity, such as a Delaware corporation that is a member of the DLLC, such manager or representative of a member will likely owe an equal fiduciary duty of good management to the DLLC and the member).

⁵⁹ Moscow, *supra* note 54, at 12.

⁶⁰ See Glover, *supra* note 38.

⁶¹ The "line of business" test was announced in the landmark case of *Guth v. Loft, Inc.*, 5 A.2d 503 (Del. 1939), as follows:

if there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, is, from its nature, in the line of the corporation's business and is of practical advantage to it, is one in which the corporation has an interest or a reasonable expectancy, and, by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation, the law will not permit him to seize the corporate opportunity for himself.

Id. at 511.

⁶² The "fairness" test was articulated by the Massachusetts Supreme Judicial Court in *Durfee v. Durfee & Canning, Inc.*, 80 N.E.2d 522 (Mass. 1948), as follows: the "true basis of the governing doctrine rests fundamentally on the unfairness in the particular circumstances of a director, whose relation to the corporation is fiduciary, 'taking advantage of an opportunity [for his personal profit] when the interest of the corporation justly call[s] for protection.'" *Id.* at 529.

⁶³ The "expectancy" test, articulated by the Alabama courts in *Lagarde v. Anniston Lime & Stone Co.*, 126 Ala. 496 (1899), would look to whether the director or officer usurped a corporate opportunity in which "the corporation has an interest already existing or in which it has an expectancy growing out of an existing right." *Id.* at 502.

or the American Law Institute's guidelines⁶⁴) are not adequate for application to the joint venture context. The common law tests and the ALI principles do not offer sufficient guidance to a director or officer who holds multiple fiduciary obligations.⁶⁵ The alternative would be to either narrowly define the concept of corporate opportunity in the instruments that govern the alliance or to contractually disclaim that loyalty duties attach.⁶⁶ However, while the former alternative seems more or less illusory given the practical impossibility of drafting in anticipation of the unforeseen,⁶⁷ the latter seems to undermine the very foundation of the joint venture relationship, namely the existence of a relationship of trust.⁶⁸

Other commentators, most persuasively Cyril Moscow, call for an abandonment of corporate law rhetoric altogether. While recognizing that in an ideal world interested directors should attempt to fairly pursue the interests of all shareholders, these commentators argue that in the real world representative directors should be allowed to maximize the interests of their sponsor to some extent, as they are expected to do.⁶⁹ These "skeptics" recognize that there exists an insurmountable gap between the academic discourse of corporate law, which holds representative directors to the same standards of care and loyalty as independent directors, and reality.⁷⁰ Questioning whether cases like *Weinberger* are anything more than attempts to create an artificial, unrealistic, and ideal corporate model of director independence, they suggest a different approach that recognizes the representative directors' dilemma, allows contractual disclaimers of duties to a certain degree, limits the directors' ability to unabashedly pursue sponsor interest, but allows them to share information with their sponsor.⁷¹

III. A JOINT VENTURE AT WORK

The recently dissolved strategic alliance known as Time Warner Entertainment ("TWE") is a paradigmatic illustration of the complexities that surround joint venture agreements. TWE, a "wickedly confusing joint venture,"⁷² was created in 1991, when Time Warner sold 12.5% of its movie and cable holdings to two

⁶⁴ See ALI, *Principles of Corporate Governance* §§ 5.05, 5.06 (1992).

⁶⁵ See Woolf, *supra* note 51, at 473.

⁶⁶ *Id.* at 498.

⁶⁷ See *supra* notes 34-43 and accompanying text.

⁶⁸ See Dent, *supra* note 37, at 66-69.

⁶⁹ See Moscow, *supra* note 54, at 18.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Marc Gunter & Stephanie N. Mehta, *The Mess At AOL Time Warner: Can Steve Case Make Sense of This Beast?*, FORTUNE, May 2002, at 74.

Japanese corporate giants, Toshiba Corp. and Itoh Cho Co., in exchange for \$1 billion.⁷³ In 1993, TWE raised another \$2.5 billion when US West, Inc., purchased a 25% interest in the partnership.⁷⁴ At the time, telephone and cable companies were competing and searching for ways to provide a “new generation of telecommunications services in the home, including video phone calling, movies on demand, interactive shopping services and hundreds of TV channels.”⁷⁵ US West’s investment in the TWE partnership and its joint venture agreement with Time Warner were perceived to benefit both companies as a way to finance the implementation of the then novel “information superhighway.”⁷⁶ Other participants in the telecommunications industry recognized the groundbreaking nature of the deal, commenting that “over the next couple of decades, you’re going to see a lot of joining together of cable and telco industries.”⁷⁷

The first discord between US West and Time Warner occurred in 1995. Earlier that year, US West acquired MediaOne. Following the acquisition, US West created Media Group to control its stake in TWE.⁷⁸ In the fall of 1995, Time Warner revealed plans to acquire Turner Broadcasting Systems Inc.⁷⁹ US West announced that it disagreed with Time Warner’s plans, arguing that Time Warner, the general partner of TWE, breached its fiduciary duty owed to the limited partners of TWE because the acquisition would usurp a business opportunity of the partnership. Specifically, US West alleged that Time Warner’s intended acquisition of Turner would violate a non-compete agreement signed by TWE’s partners: Turner owned several cable networks which, if the acquisition were completed, would compete with the partnership’s Home Box Office (HBO) network; further, Turner’s movie studios were likely to compete with the Warner Brothers movie studios controlled by TWE.⁸⁰ US West’s suit, seeking to block the merger, was filed minutes after the merger agreement had been signed by Turner and Time Warner, in March of 1996.⁸¹ Despite its dis-

⁷³ See Paul Farhi, *Phone Firm Buying 25% Stake in Time Warner Entertainment*, WASH. POST, May 17, 1993, at A1.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *New Slant On Old Arguments: US West Teams Up With Time Warner in ‘Landmark’ Move For Telcos*, COMM. DAILY, May 18, 1993, at 2.

⁷⁸ Kelly Carroll, *Last Call For Residential DSL?*, TELEPHONY, Jan. 2000, available at LEXIS, News Group File, All.

⁷⁹ *US West Files Suit to Halt Time Warner-Turner Merger*, BLOOMBERG NEWS, Sept. 22, 1995, available at LEXIS, News Group File, All.

⁸⁰ *Id.*

⁸¹ Carroll, *supra* note 78.

agreement with Time Warner's acquisition, US West did not appeal the decision granting dismissal of the suit, which followed in June later that year.⁸²

In June of 1998, US West spun off its Media Group. The spin off led to the creation of a new entity, MediaOne Group, designed to control the 25% stake in the TWE partnership.⁸³ In April of the following year, AT&T announced that it was pursuing a \$58 billion purchase of MediaOne Group.⁸⁴ AT&T's proposed acquisition of MediaOne was perceived to "strengthen AT&T's position as the nation's leading cable provider and enhance the company's ability to bundle voice, video, and Internet communications services to its customers."⁸⁵ Further, market analysts speculated that the acquisition would benefit AT&T in the long run since MediaOne's stake in TWE was thought to be "an obstacle in the completion of a joint venture telephony relationship between AT&T and Time Warner."⁸⁶

On January 10, 2000, Time Warner announced new plans of its own, agreeing to merge with America Online Inc. ("AOL") in a \$162 billion stock transaction.⁸⁷ The merger purported to "launch the next Internet revolution."⁸⁸ It also marked a victory for America Online, a company that "had been fighting to gain access to the high-speed Internet systems provided through cable companies."⁸⁹ In that respect, the merger was a defeat for AT&T and brought to a halt the possibility of a substantial cooperation between AT&T and Time Warner.

Following the announcement of the AOL-Time Warner merger, AT&T signaled its desire to dissolve the TWE partnership. Both AOL Time Warner and AT&T feared that the intricacy of their relationship, and their very different visions of the future, unduly confused investors.⁹⁰ Furthermore, following the news that AT&T was selling its cable-TV business to a Time Warner com-

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *AT&T, Subsidiaries Affirmed by Fitch IBCA Following Bid for MediaOne*, PR NEWSWIRE, Apr. 23, 1999, available at LEXIS, News Group File, All.

⁸⁶ *Id.*

⁸⁷ See, e.g., Tim Jones, *Deal Transforms Media Landscape: \$162 Billion Marriage Joins Internet, Cable and Content*, CHICAGO TRIBUNE, Jan. 11, 2000, at 1.

⁸⁸ *Id.* (citing Steve Case, the founder and chief executive of America Online).

⁸⁹ *Id.*; see also Joshua Cho, *AT&T Seeks to Dissolve Most JVs Thru Swaps*, CABLE WORLD, June 1999, at 8, available at LEXIS, News Group File, All (reporting America Online's unsuccessful lobbying for access to AT&T's broadband networks).

⁹⁰ See Lisa Levenson, *AT&T, AOL Time Warner Hire Bank of America to Appraise Venture*, BLOOMBERG NEWS, July 2, 2002, available at LEXIS, New Group File, All.

petitor, Comcast Corp.,⁹¹ the purpose of AT&T's investment in the partnership became unclear.

Pursuant to the terms of the TWE joint venture agreement, the venturers possessed registration rights. After its acquisition of MediaOne Group, AT&T inherited US West's right to cause a public offering of TWE stock.⁹² Alternatively, under the agreement, AT&T could require that AOL Time Warner buy as much of its stake as the public would, pursuant to an opinion provided by an investment banker.⁹³ Estimates valued AT&T's stake in TWE at somewhere between \$7.5 and \$10 billion.⁹⁴ After failed attempts to agree on a fair price, AT&T commenced the process of turning the venture into a publicly traded entity.⁹⁵

Because AOL Time Warner disfavored the idea of an IPO, intense negotiation yielded a different solution: AT&T received about \$2 billion in cash, about \$1.5 billion in AOL Time Warner stock, and approximately a 20% stake in a newly formed entity, Time Warner Cable.⁹⁶ Comcast, Time Warner's competitor and the acquirer of AT&T's cable-TV operations, inherited the 20% stake in Time Warner Cable and an option of later selling it as part of an initial public offering.⁹⁷

Hence, after almost a decade since US West purchased its stake in the partnership, the TWE venture was finally dissolved. Its history illustrates the several assumptions that stand underneath the arguments raised in the pages that follow:

- Joint venture agreements serve as means by which the venturers attempt to exploit synergistic factors with an expectation of profit. In TWE's case, the alliance was between the telecommunications and the cable provider industries.⁹⁸

- By entering strategic alliances, parent companies essentially make predictions about the future and resort to the joint venture form to share the inherent risk. Here the prediction was that the telecom-cable alliance would be fruitful in the

⁹¹ *Id.*

⁹² See Seth Schiesel & Andrew Ross Sorkin, *AT&T Asks \$1 Billion of AOL Time Warner*, N.Y. TIMES, July 29, 2002, at C2.

⁹³ See *id.*

⁹⁴ See Seth Schiesel, *AT&T and AOL Are Said to Seek Delay in Evaluation of Joint Entertainment Unit*, N.Y. TIMES, July 30, 2002, at C3.

⁹⁵ See Seth Schiesel, *AT&T, Writing Down Cable Assets, Post Big Loss*, N.Y. TIMES, July 24, 2002, at C4.

⁹⁶ Seth Schiesel, *AOL Time Warner Near Deal on a Unit, Again*, N.Y. TIMES, Aug. 9, 2002, at C4.

⁹⁷ See *id.*

⁹⁸ See *supra* notes 75-77 and accompanying text.

future.⁹⁹ The prediction was correct since, over the course of nearly a decade, US West's \$2.5 billion investment matured into a stake reportedly worth fourfold.¹⁰⁰

- During the life of an alliance the parties to the venture may undertake various metamorphoses. They may acquire entities that threaten to compete with the venture, like Time Warner who acquired Turner Broadcasting Systems. They may be acquired by entities that try to pursue more comprehensive alliances with the other venturer(s), like MediaOne who was acquired by AT&T.

- During the life of the venture, its success notwithstanding, the parties' respective visions of the future may change. In TWE's case, for instance, following AT&T's acquisition of MediaOne, instead of opting to pursue a more comprehensive venture with the telecom giant, Time Warner chose to pursue a merger with America Online, hoping that such an alliance would launch "the new Internet revolution."¹⁰¹

IV. THE DESIRABILITY OF AN EQUITY INVESTMENT ARRANGEMENT TO SUPPLEMENT THE JOINT VENTURE AGREEMENT

When should a venturer bargain for an equity stake in its potential ally? When should both venturers resort to cross-equity investments? The following section commences by exploring ways in which such arrangements might be beneficial to the common alliance; it then suggests a non-exhaustive list of factors that should be considered before a decision to pursue these investments is made.

Joint venture agreements are pursued in part because of their ability to minimize risk.¹⁰² Even so, risks are not always evenly distributed between the venturers. Often, in a strategic alliance, one of the venturers (V1) possesses the capital, while the other venturer (V2) possesses, as sole assets, a research plan or certain know-how.¹⁰³ In those circumstances a joint product alliance between the two entities would spread the risk unevenly between V1 and V2, and the two partners' respective commitments to the joint

⁹⁹ See *id.*

¹⁰⁰ See *supra* note 94 and accompanying text.

¹⁰¹ See *supra* notes 87-89 and accompanying text.

¹⁰² See *supra* notes 19-21 and accompanying text.

¹⁰³ See Dent, *supra* note 5, at 73 ("[I]n some research and development alliances one party does most of the research while the other (usually the larger firm and a potential user of the product to be developed) provides financing.").

effort might differ. To counterbalance these considerations, it would make sense for V2 to try to acquire an equity stake in V1. By agreeing to issue common stock for V2's benefit, V1 would most likely convince it of its commitment to the joint effort, to their common financial future, and to the fairness of the transaction.¹⁰⁴ Similarly, if V1 believes in the success of the alliance, it will most likely wish to bargain for an equity stake in V2. Such a stake would entitle it to share in V2's future successes and allow it to have a say in how that future should be fashioned.

In addition to binding the parties' interests and to ensuring their sustained commitment to the venture, these investments can answer more fundamental concerns. Cross-equity investments can minimize corporate opportunity problems likely to occur in the context of the joint venture: if V1 decides to pursue a corporate opportunity that arguably belongs to the venture, then V2 would still share in the rewards. This might minimize the chances of V2's disagreeing with V1's decision. In cross-equity joint ventures, the vexing fiduciary duty analyses are simplified, and the efficient result may be more likely to prevail.¹⁰⁵

Furthermore, acquiring an equity stake allows a venturer to protect itself from leakages of indirect value. In other words, by asking V1 to obtain an equity stake in V2, V2 can protect itself from the eventuality that V1 might "appropriate know-how belonging to the other party or developed by the two parties jointly."¹⁰⁶

That appropriation of know-how could occur inadvertently, as there often is mobility among employees of the joint venture and

¹⁰⁴ *Id.* at 63 ("An alliance needs trust and cooperation; it will not thrive if even one side judges the deal unfair. People who feel abused often retaliate, even if they know that retaliation is costly. In a bad contract both sides may withhold their best efforts. The stronger party should seek fair terms, explain its proposals, and listen to its partner.").

¹⁰⁵ Although, as previously stated, the antitrust concerns raised by cross-equity joint ventures are outside the ambit of this Article, it would seem that cross-equity investments – if indeed they allow for the efficient mechanisms of competition to impact the venturers' decision-making – would not raise significant antitrust policy issues. See Werden, *supra* note 6, at 704 ("[A]ntitrust analysis of joint ventures depends a great deal on how the venture affects the independent decision making of its participants and which competitive strategies are affected.").

¹⁰⁶ Dent, *supra* note 5, at 69. The leakage of indirect value could have been a reason why, as part of a joint venture agreement signed by DuPont and Pioneer Hi-Bred, DuPont agreed to purchase an equity stake in Pioneer Hi-Bred. DuPont "bought a 20 percent stake in Pioneer in 1997, giving DuPont access to Pioneer's knowledge of seed development." Michael Lovell, *The Cost of Consolidation, Is Des Moines on the Wrong End of M & A?*, DES MOINES BUSINESS RECORD, Oct. 14, 2002, available at 2002 WL 13800637. In 1997, the two companies "began a joint research project called Optimum Quality Grains LLC, which worked to produce new varieties of corn and soybeans. Promising progress through the joint venture led DuPont to announce in March 1999 that it would pay \$7.7 billion for the 80 percent of Pioneer it didn't already own." *Id.* Mr. Fraidin advised Pioneer Hi-Bred in connection with the 1997 joint venture and again in connection with the 1999 acquisition.

the parties to the venture. While an equity stake does not provide precise protection against leakage, it can provide a level of practical fairness.

Professor Brodley noted in 1982 that "if [joint venturers] leave some terms open, there will be problems of opportunism . . . and information imbalance."¹⁰⁷ The converse of Professor's Brodley's argument is that by alleviating the tensions between the joint venturers, by reducing the incentives for opportunism, and by evening out the information imbalance, cross-equity investments allow for more flexibility in the joint venture agreement. As previously discussed, it seems that the success of the venture is tied to the degree of flexibility allowed for by the partnership agreement.¹⁰⁸ Equity investments, whether unilateral or bilateral, undertaken in connection with a joint venture agreement would thus seem to foster flexibility in their agreement.

Finally, as previously suggested, given that strategic alliances often occur in concentrated markets where repeat players battle each other for the same audience, the existence of an equity investment agreement between the joint venturers could minimize the possibility that the assets of the venturers, or those of the joint venture, would fall in the hands of a competitor. For instance, the presence of such an investment in TWE's case might have made the Time Warner – Comcast alliance less likely.¹⁰⁹

To be sure, equity investments undertaken in connection with a joint venture agreement are not always desirable. However, there are instances where they can substantially contribute to the success of the venture. To summarize, attention should be generally paid to the following factors:

- The degree of risk posed by the alliance: Are risks distributed evenly?

- The nature of the venturers: Is this the type of alliance that might be conducive to an equity arrangement?

¹⁰⁷ Brodley, *supra* note 6, at 1527.

¹⁰⁸ See *supra* notes 38-40 and accompanying text.

¹⁰⁹ See *supra* text accompanying notes 91-97. However, for the same reasons, the existence of an equity investment agreement between V1 and V2 might be deemed a defensive maneuver under *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985). To prevent the venturers' decision from judicial second-guessing, compliance with the factors set forth by the Delaware Supreme Court in *Unocal* and decisions that follow that case is required. See *infra* discussion accompanying footnotes 134-39.

- The potential that the parties' respective visions of the future might change: Are the venturers engaged in the type of industry where staying ahead of the competition is essential?
- The level of trust otherwise existent between the venturers: Can the venturers establish sufficient trust absent an equity arrangement?
- The level of flexibility otherwise achievable in the joint venture agreement: Can the joint venturers allow for sufficient flexibility in their agreement absent an equity arrangement?
- The potential for leakage of indirect value: Does one of the venturers possess a certain unique know-how?
- The degree to which the venturers wish to bind their respective financial futures: Do the venturers believe that the alliance is a "synergy test"?¹¹⁰
- The nature of the market where the alliance takes place and the degree of likelihood that a competitor would attempt to acquire the assets of the venture or of one of its parents: Do the venturers believe that an investment arrangement might help avoid those results?

V. THE IMPACT OF EQUITY POSITIONS ON THE CONTROL OF THE PARTNERS

In this section we assume that the venturers are seriously considering an equity investment arrangement, whether unilaterally or bilaterally, to supplement their joint venture agreement. Put into practice, such investments raise concerns from the perspective of both the investee and the investing company. Some of the more significant of these concerns are discussed below. The discussion is broken into two sections: (1) Corporate governance and future operations issues; and (2) Fiduciary duty issues.

¹¹⁰ See *supra* text accompanying note 33.

A. *The Impact of Equity Investments on Corporate Governance Issues and on Future Operations*

1. *Issues for the Investee*

- **Governance:** Equity arrangements can impact the investee company's internal management and control. Obviously, the larger the equity stake involved, the larger the degree of control the investing party would wield over the internal operations of the investee company. Consequently, the investee company will likely be concerned about its continued autonomy.
- **Acquisition:** By some estimates, up to 75% of joint ventures ultimately conclude with one party acquiring the other.¹¹¹ Since joint ventures are often a prelude to acquisition, the investee may wish to prevent the investing party from seeking to attempt a future purchase without the approval of the investment board. This can be particularly true in the case of joint ventures with an equity investment component since the investing party will have certain advantages over potential third-party acquirers in light of its equity position (i.e. lower average cost).

2. *Issues for the Investor*

- **Equity accounting:** In joint ventures with a substantial equity investment component, the investing party may be required to use the "equity method" of accounting (the "equity method"). The equity method would require the investor to report its share of the investee's earnings as incurred, rather than as received in the form of dividends.

In Opinion No. 18, entitled *The Equity Method of Accounting for Investments in Common Stock*, the Accounting Principles Board (APB) concluded that Generally Accepted Accounting Principles (GAAP) require an investor to use the equity method when the investor's equity stake permits the company to "exercise significant influence over operating and financial policies of an invest-

¹¹¹ Joel Bleeker & David Ernst, *The Way to Win in Cross-Border Alliances*, in COLLABORATING TO COMPETE 29 (Joel Bleeker & David Ernst eds., 1993).

tee even though the investor holds 50% or less of the voting stock."¹¹²

APB Opinion No. 18 highlights several factors which would amount to "significant influence," including representation on the investee's board of directors, participation in its policy-making process, material intercompany transactions, and the interchange of managerial personnel or technological dependency.

Furthermore, the ability to exercise "significant influence" is presumed to exist in investments of 20% or more and is presumed not to exist for investments of less than 20%.¹¹³

If a joint venture agreement affords the investor an equity investment component greater than a 20% interest in the investee, the presumption that the investor would exercise "significant influence" (thus, triggering the application of equity accounting principles) can be overcome only by "facts and circumstances" which indicate the contrary, including evidence that the investor and investee entered into an agreement under which the investor surrendered significant rights as a shareholder.¹¹⁴

- **Control:** The investing company may wish to restrict the ability of the investee to sell a substantial equity stake to a third party or, particularly, a competitor. At the least, the investing party may wish to retain the ability to withdraw its investment in the event of a change in control of the investee.
- **Ability to compete for control:** The investing party may also want to retain the ability to compete for control of the investee if the investee were to decide in the future to sell.
- **Commitment of resources:** Finally, the investing party may not want to tie up scarce economic resources in the other party for a prolonged period of time.

In joint venture transactions with an equity component, the parties will often address these concerns through an investment agreement of one form or another. Investment agreements often contain one or more of the following provisions:

¹¹² The Equity Method of Accounting for Investments in Common Stock, 10 Opinions of the Accounting Principles Board 347, 355 (1971).

¹¹³ See *id.*

¹¹⁴ See FINANCIAL ACCOUNTING STANDARDS BOARD, FASB INTERPRETATION No. 35 [CRITERIA FOR APPLYING THE EQUITY METHOD OF ACCOUNTING FOR INVESTMENTS IN COMMON STOCK: AN INTERPRETATION OF APB OPINION No. 18] 1 (1981).

- **Governance provisions** that place restrictions on voting rights and/or nomination of board members. On the other hand, the investing party may require certain concessions, including veto rights;
- **A registration rights agreement** between the parties;
- **A standstill restriction** which prevents the investing party from: (1) purchasing an additional equity stake in the investee company; (2) proposing or seeking to effect a merger, acquisition, or similar transaction of the investee company, announcing an intention to do so, or assisting a third party in doing so; or (3) soliciting proxies, making shareholder proposals, or entering into voting trusts. The investing party may require that these standstill restrictions be lifted in the event of a proposed merger or acquisition initiated by the investee company or by a third party, or any change of control event; and
- **A restriction** on the investing party's ability to dispose of its equity stake for a period of time, while allowing the investing party to sell in the event of a change of control or other triggering event.

3. *Length of Time*

Time limits on governance limitations and standstill arrangements are often an important subject of negotiations between parties to an equity investment agreement. Research indicates that such restrictions can range in length from a few years to perpetuity.¹¹⁵ One important factor in negotiating the expiration of these restrictions is the duration of the joint venture. What are the implications on the investee if the restrictions lapse while the joint venture continues? Conversely, what are the justifications, if any, for the restrictions to continue after the joint venture has terminated?

Take, for example, Borden, Inc.'s \$360 million, 39% equity investment in AEP Industries undertaken in connection with the

¹¹⁵ Meryl S. Rosenblatt, *Letters of Intent and Exclusivity, Confidentiality and Standstill Agreements*, in DRAFTING CORPORATE AGREEMENTS 95, 120, 1349 (Practicing Law Institute 2002) ("Standstills entered into in the context of a friendly negotiated acquisition transaction can typically last from 1 to 5 years.").

sale of its packaging business to AEP.¹¹⁶ The parties' agreement restricted Borden's ability to purchase additional securities absent a sale of AEP's entire voting interest to a third party. The standstill agreement between AEP and Borden had a length of three years unless AEP reduced its ownership stake to 0%. In addition, the agreement between Borden and AEP called for Borden to designate four of the ten directors on the AEP board, with a fifth director to be designated jointly by the two companies.¹¹⁷

On the other end of the spectrum, consider the 23.4% equity stake in Martin Marietta Corporation received by General Electric Company in 1993 as part of Martin Marietta's acquisition of GE Aerospace.¹¹⁸ The companies negotiated an agreement whereby GE acquired two seats on the Martin Marietta board. The agreement prohibits GE from acquiring any additional stock and requires GE to vote its stock in Martin Marietta according to the wishes of the Martin Marietta board slate or, in limited circumstances, in proportion with other shareholders. The agreement between GE and Martin Marietta lasts in perpetuity, unless and until GE were to reduce its ownership stake to less than 5%.

4. *Impact on Future Operations*

Joint venture arrangements, especially where they contain an equity investment, have the potential to substantially affect the future business options of one or both parties.

Joint venture agreements have the potential to deter future bidders for the investee company in several ways.¹¹⁹

¹¹⁶ In 1996, Borden, Inc. sold its packaging unit for approximately \$360 million in cash and stock to AEP Industries. See Ron Carter, *Borden Selling Packaging Unit for \$360 Million*, COLUMBUS DISPATCH, June 21, 1996, at 1C.

¹¹⁷ *Id.*

¹¹⁸ Martin Marietta acquired GE Aerospace in 1993 in a deal worth \$3.05 billion. In exchange for GE Aerospace, GE received approximately \$2 billion in cash and receivables and the remainder in preferred convertible stock. See Judith Gaines, *Pittsfield Peers Beyond GE Embrace*, BOSTON GLOBE, Dec. 6, 1992, at 1. Martin Marietta Corporation is now Lockheed Martin.

¹¹⁹ For an interesting example of an agreement whose effect is to deter future bidders, see Peter Landers, *Merck Sacrificed Right to Make Buyout Offer to Schering-Plough*, WALL ST. J., Oct., 22, 2002, at B3. In May of 2000, Merck and Schering-Plough created a joint venture to cooperate in developing and marketing a new anti-cholesterol drug called Zetia. The parties expected that, if successful, Zetia would create sales that ranged in the billions. In connection with the joint venture agreement, Merck & Co. has given up the right to make a buyout offer for Schering-Plough unless specifically requested in writing by Schering-Plough's board of directors. If, however, Schering-Plough's board entertains offers from a third company, Merck has the right to make an offer of its own. Furthermore, Merck can take full control of Schering-Plough's half of the Zetia joint venture if a third company buys Schering-Plough. This last provision seems to significantly reduce the chance that any third company would make a buyout offer.

- First, a bidder might have a difficult time valuing the “open-ended” nature of the joint venture relationship.
- Additionally, a bidder’s valuation of a venturing party could vary significantly depending upon whether its partner would be willing to continue venture operations and/or exercise its “exit” rights.
- If the venture arrangement contains a significant cross equity component, the investor’s equity stake would give it a financial advantage over other bidders for the investee (i.e. lower average cost). Bidders might be unwilling to act as a “stalking horse” for the investing company with no upside potential.
- In another variation of the “stalking horse” theme, some joint venture investment agreements give the investing party “notice” and “full and fair opportunity to bid” rights.
- Finally, the joint venture could give one of the venturers actual or perceived informational advantages over other bidders. This is particularly true if, as is often the case, the investor has representatives on the board of the investee.

In addition, joint venture agreements can provide one or both companies with a potential defensive response to a future unsolicited bid. To the extent that the discounted future value of the joint venture could not be realized because the other party to the joint venture has favorable buy-out rights if there is a change of control, the board could determine that a bid is inadequate and that it is in the best interests of the Company to remain independent since, absent a change of control, the value of the company would be greater. Moreover, these arrangements can deprive shareholders of a fully-priced bid for their company.

Moreover, the universe of potential buyers could be reduced by the “deterrent” aspects of joint venture agreements mentioned above.¹²⁰

However, a joint venture can be structured so as to provide certain advantages in the event of a future decision to sell by preserving or improving the selling company’s ability to maximize shareholder value. For example, in a joint venture with a substantial equity investment, the investing party can ensure that its stand-

¹²⁰ See *id.*

still agreement would remain in effect if the investing company were to lose in the auction process, thus prohibiting the investing company from soliciting against the winning bid (sometimes called an "end run").

Finally, investment agreements often contain voting restrictions which require the investing company to vote its shares in favor of the investee board's slate. This could be of significant value in the event of a future proxy contest.

B. The Impact of Joint Venture Agreements and Equity Investments on Fiduciary Obligations

As previously discussed, a joint venture agreement can result in complex issues of fiduciary duties.¹²¹ In addition, the structure of a joint venture arrangement, with or without a collateral equity investment, can have a more substantial impact on the fiduciary obligations of one or both of the joint venture partners if the joint venture agreements, taken as a whole, might be viewed as either: (1) a sale of control of one of the venturers; or (2) a defense against takeover by one of the venturers.

1. Overview of Fiduciary Obligations

In the performance of their corporate responsibilities, corporate directors have an obligation to exercise the care that an ordinarily prudent person would exercise under similar circumstances. This is generally called the "duty of care."¹²² In addition, directors are bound by a "duty of loyalty," which prohibits corporate officers from using their position of trust and confidence to further private interests.¹²³

When reviewing whether a board of directors' approval of a given transaction satisfies the "duty of care" and the "duty of loyalty" requirements, courts will generally apply the "business judgment rule," a presumption that the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company.¹²⁴ If

¹²¹ See *supra* pages 10-13 and accompanying footnotes.

¹²² See, e.g., *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125, 130 (Del. 1963) (adopting the "prudent man" standard in the duty of care context); see also *Norlin Corp. v. Rooney, Pace Inc.*, 744 F.2d 255, 264 (2d Cir. 1984); *supra* note 48.

¹²³ See *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939); see also *supra* notes 60-62.

¹²⁴ For an early formulation of the "business judgment rule" see *Bodell v. General Gas & Electric Corp.*, 140 A. 264, 268 (Del. 1927) (holding that the presumption applies where "the acts of the directors objected to were performed in good faith, in the exercise of their best judgment, and for what they believed to be the advantage of the corporation and all its stockholders."); see also *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971) (holding that the

this presumption applies, corporate decision-makers would be shielded from judicial second-guessing.

2. *Sale of Control*

If a joint venture transaction (or the equity investment component) would be viewed as a sale of fundamental control over one of the parties, the courts could apply a special fiduciary duty analysis upon the company's board of directors. According to the Delaware Supreme Court in *Revlon Inc. v. MacAndrews & Forbes Holdings, Inc.*, if a "sale" or "break-up" of a company becomes "inevitable," the duty of the board of directors changes "from the preservation of [the corporation] as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit," thus requiring the board to act as "auctioneers charged with getting the best price for the stockholders."¹²⁵ In such circumstances, the members of the board have to perform their duties with a single objective in mind: the maximization of shareholder value.¹²⁶ In order to ascertain whether board members have complied with their "duty to auction," Delaware courts apply a more searching scrutiny.¹²⁷

Decisions since *Revlon* have extended this "auction duty" beyond the factual context of the "sale" or "break-up." For instance, the Delaware Supreme Court held in *Paramount Communications, Inc. v. QVC Network Inc.*¹²⁸ that "the directors' obligation to seek the best value reasonably available for the stockholders" applies whenever there is "a pending sale of control, regardless of whether or not there would be a break-up of the corporation."¹²⁹ Surveying

"intrinsic fairness" test and not the business judgment rule should apply in the context of a parent-subsidiary relationship).

¹²⁵ 506 A.2d 173, 182 (Del. 1986) (enjoining enforcement of an asset lock-up option, a no-shop provision, and a break-up fee granted to favor a favored bidder).

¹²⁶ It is important to note that *Revlon* does not impose a new type of duty upon the board members, but rather requires them to perform their duties with a sole objective in mind – maximization of shareholder value. See *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001) ("In our view, *Revlon* neither creates a new type of fiduciary duty in the sale-of-control context nor alters the nature of the fiduciary duties that generally apply. Rather, *Revlon* emphasizes that the board must perform its fiduciary duties in the service of a specific objective: maximizing the sale price of the enterprise."); see also *Paramount Comm., Inc. v. QVC Network, Inc.*, 637 A.2d 34, 43 (Del. 1994) ("The directors' fiduciary duties in a sale of control context are those which generally attach. In short, 'the directors must act in accordance with their fundamental duties of care and loyalty.'" (citation omitted); *id.* at 44 ("In the sale of control context, the directors must focus on one primary objective – to secure the transaction offering the best value reasonably available for the stockholders – and they must exercise their fiduciary duties to further that end.").

¹²⁷ *Malpiede*, 780 A.2d at 1084 ("[T]he *Revlon* doctrine imposes enhanced judicial scrutiny of certain transactions involving a sale of control.").

¹²⁸ 637 A.2d 34 (Del. 1994).

¹²⁹ *Id.* at 46.

decisions since *Revlon*, the court noted that “the general principles announced in *Revlon*” govern “every case in which a fundamental change of corporate control occurs or is contemplated,” and that “in a sale of corporate control the responsibility of directors is to get the highest value reasonably attainable for the shareholders.”¹³⁰

The answer to the question of whether a given transaction would constitute “a fundamental change of corporate control” is a highly fact-specific inquiry, and “the answer must be sought in the specific circumstances surrounding the transaction.”¹³¹

In holding that the transfer of a majority of stock from public shareholders to a controlling shareholder triggered the duty to maximize shareholder value under the *Revlon* case, the *QVC* court found particularly significant the fact that a majority of Paramount’s voting stock would transfer from “fluid aggregation of unaffiliated stockholders” to a single “controlling stockholder” who would have the power to (a) elect directors; (b) cause a break-up of the corporation; (c) merge it with another company; (d) cash-out the public stockholders; (e) amend the certificate of incorporation; (f) sell all or substantially all of the corporate assets; or (g) otherwise alter materially the nature of the corporation and the public stockholders’ interests.¹³²

The significance of the *Revlon* case and its progeny is simply that joint venture arrangements, with or without an ancillary equity investment agreement, have the potential to trigger the “duty to auction” if one or more of the factors outlined in the *QVC* case would result from the transaction. In order to prevent courts from second-guessing a company’s decision to enter into a joint venture with a substantial equity investment, the board of directors of the investee company may wish to consider negotiating a standstill arrangement which would do one or more of the following:

- Place a cap on the investing party’s ownership level and/or its ability to increase its voting power through other means;
- Place voting restrictions on the investing party’s equity share;
- Limit the ability of the investing party to transfer its shares in large blocks to any single third party; or

¹³⁰ *Id.*

¹³¹ *Id.* (citations omitted).

¹³² *Id.* at 46-48.

- Limit the ability of the investing party to elect a majority of the board of directors.

Since there is no “magic bullet” answer to the question of “what constitutes a change in control,” in order to get the benefit of the business judgment rule, the investee company must consider its fiduciary obligations thoroughly.

An effective standstill arrangement can eliminate many of the fiduciary risks associated with cross equity investments. However, there is still an open question as to how large an equity stake would be sufficient to effect a change in control even with a standstill agreement. What if the investor were to acquire a fifty-one percent interest in the investee? How long would the standstill have to last in this situation? What terms must the standstill contain?

The answer to these questions is uncertain, but the guiding principle would be that if, after the investment, the shareholders of the investee would be able to get a full takeover premium for their shares, a *Revlon* event probably has not have occurred.¹³³

3. *Defensive Response to a Takeover Threat*

If a joint venture agreement, or its equity investment component, is deemed to be a defensive maneuver of the type described in *Unocal* and its progeny, for the board to be protected by the business judgment rule, the board’s actions must survive what the Delaware courts call “enhanced review.” To satisfy the first prong of the *Unocal* review and show that a potential unsolicited takeover bid would be inimical to corporate effectiveness and policy, it is enough that the board establish that it acted in good faith and

¹³³ See, e.g., *In re Unitrin, Inc. Shareholders Litigation*, 1994 De. Ch. LEXIS 187, at *15, 1994 WL 698483 (Del. Ch. Oct. 13, 1994), *rev’d on other ground sub nom.*, *Unitrin, Inc. v. American Gen. Corp.*, 651 A.2d 1361 (Del. 1995) In the context of a stock repurchase program initiated by certain stockholder directors in response to a takeover threat, that the stock repurchase program was reviewable under *Unocal* and did not trigger *Revlon* scrutiny:

Unitrin’s stockholder directors will have *none* of these powers [enunciated by the *QVC* court] – they will only acquire the ability to block a merger with another company. The stockholder directors will acquire control over the *decision* whether to sell Unitrin, but the public stockholders will still receive their control premium *if* those directors decide to sell. The transfer of the decision whether to sell the corporation to the stockholder directors in response to American General’s offer is a defensive action that must be evaluated under *Unocal*, not a transfer of control that requires the directors to maximize short term stockholder value in accordance with *Revlon*.

Id. (emphasis added).

upon reasonable investigation.¹³⁴ To satisfy the second prong of the *Unocal* review, the proportionality test, the board must establish that the challenged transaction is "not Draconian" in nature.¹³⁵ The term "not Draconian" was later explained as referring to a measure that is "not either coercive or preclusive."¹³⁶ If the measure is "not Draconian," then the *Unocal* proportionality test guides the enhanced judicial scrutiny towards the "the range of reasonableness."¹³⁷

Prominent commentators have noted that, as applied, the *Unocal* enhanced scrutiny is merely a "dressed up" business judgment review. For instance, Professors Gilson and Black see *Unocal* review as "primarily a formal, rhetorical instruction rather than a substantive standard of review."¹³⁸ The Delaware Supreme Court itself seems to have endorsed this view. The Court's analysis in *Unitrin Inc., v. American General Corp.* suggests strongly that "Draconian" measures are only those of extreme nature. The Court itself emphasized its careful choice of words, and defined "Draconian" literally, as:

Of or pert. to Draco, an archon and member of the Athenian eupatridae, or the code of laws which is said to have been framed about 621 B.C. by him as thesmothete. In them the penalty for most offenses was death, and to a later age they seemed so severe that they were said to be written in blood. Hence, barbarously severe; harsh; cruel.¹³⁹

Delaware law would suggest that joint venture agreements, where undertaken with an expectation of profit and as a means of leveling risks, would survive *Unocal* review. Furthermore, as the

¹³⁴ See *Unocal*, 493 A.2d at 955 (citation omitted); see also *Aquila, Inc. v. Quanta Services, Inc.*, 805 A.2d 196, 206 (Del. Ch. 2002) ("[T]he first element of the *Unocal* test is satisfied by evidence of the directors' good faith and reasonable investigation. Here, where a majority of the members of the Special Committee that authorized the [defensive maneuver] are outside, independent directors, such evidence of good faith and reasonable investigation is 'materially enhanced.'")

¹³⁵ *Unocal*, 493 A.2d at 955 ("As we have noted, [the board's] duty of care extends to protecting the corporation and its owners from perceived harm whether a threat originates from third parties or other shareholders. But such powers are not absolute. A corporation does not have unbridled discretion to defeat any perceived threat by any Draconian means available.")

¹³⁶ *Unitrin*, 651 A.2d at 1387-88. A measure is *not coercive* where it is not aimed at "cramming down" on shareholders a management-sponsored alternative. *Paramount Comm., Inc. v. Time, Inc.*, 571 A.2d 1140, 1154-55 (Del. 1989). A measure is *not preclusive* where it does not strip the "stockholders of their rights to receive tender offers" and did not "fundamentally restrict proxy contests." *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1357 (Del. 1985).

¹³⁷ *Unitrin*, 651 A.2d at 1388 (citing *Paramount Comm., Inc.*, 637 A.2d at 45-46).

¹³⁸ RONALD J. GILSON & BERNARD S. BLACK, *THE LAW AND FINANCE OF CORPORATE ACQUISITIONS* 849 (David L. Shapiro et al. eds., 2d ed. 1995).

¹³⁹ *Unitrin*, 651 A.2d at 1383-84 n.34 (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 780 (2d ed. 1951)) (emphasis added).

foregoing pages establish, because ancillary equity investments are sometimes essential to the success of the venture, it is likely that they will survive *Unocal* review as well, especially where some safeguards described in this Article are considered or adopted.

Nonetheless, the board of directors of the investee company should take adequate steps, and ensure that it understands all the terms of the agreement, especially the implications the venture and investment will have on the potential takeover premium that may become available to shareholders of the company.

CONCLUSION

As this Article demonstrates, joint ventures are complex vehicles which present challenges for the venturing parties, as well as public policy issues. When structuring a joint venture transaction, the parties should pay particular attention to the strategic purposes underlying the decision to employ a joint venture, rather than some other vehicle. In addition, the parties should focus upon the impact a particular structure or particular contractual provisions could have not only on the governance and control of the venture itself, but, perhaps more importantly, upon the governance and control of the venturing parties.